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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM and RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF FARM CREDIT OF WESTERN NEW YORK, ACA, FIRST PIONEER FARM CREDIT, ACA, EMPIRE FARM CREDIT, ACA, YANKEE FARM CREDIT, ACA, FARM CREDIT OF MAINE, ACA, AND COBANK, ACB, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	PAGE
ISSUES PRESENTED	1
INTEREST OF AMICI CURIAE	2
ISSUES	3
1. The Second Circuit decision is contrary to the generally accepted interpretation of the Clean Water Act in the dairy	3
2. If allowed to stand, the Second Circuit decision will have potentially serious adverse economic consequences for all dairy farms	5
3. The potential for economic harm to the dairy industry may also have potentially adverse consequences for agricultural lenders and rural communities	7
CONCLUSION	9

TABLE OF AUTHORITIES

12 USC 2001	2
40 CFR Part 257 *et al.*	7

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ISSUES PRESENTED

The Amici Curiae respectfully urge the Court to grant Petitioner's Petition for a Writ of Certiorari.

The issues raised by Petitioner's case have important consequences for the American dairy industry and agricultural lenders serving this industry, namely:

1. The Second Circuit decision is contrary to the generally accepted interpretation of the Clean Water Act in the dairy industry and among agricultural lenders.

2. If allowed to stand, the Second Circuit decision will have potentially serious adverse economic consequences for all dairy farms.

3. The potential for economic harm to the dairy industry may also have potentially adverse consequences for agricultural lenders and rural communities.

INTEREST OF AMICI CURIAE

Farm Credit of Western New York, ACA, First Pioneer Farm Credit, ACA, Empire Farm Credit, ACA, Yankee Farm Credit, ACA, Farm Credit of Maine, ACA, and CoBank, ACB, are all members of the Farm Credit System, a federally chartered, national network of cooperatively-owned organizations providing credit and financial services to American agriculture and its cooperatives. The Farm Credit System, operating under the Farm Credit Act of 1971, as amended[1] constitutes the largest single source of credit to American agriculture. As lenders to dairy farmers and their cooperatives, we are very concerned about what we see as the potentially large negative impact of the decision of the United States Court of Appeals for the Second Circuit in this case on the American dairy industry and the lenders serving this industry.

We believe that the continued vitality of American agriculture depends upon a clean environment, and upon the use of "best management practices," which include compliance with all applicable environmental laws and regulations. Therefore, we support the overall goals of the Clean Water Act ("**CWA**").

However, the Second Circuit decision in this case goes too far. This decision is a major, unwarranted departure from the generally accepted meaning of the CWA, which has a potentially serious adverse impact upon the American dairy industry.

We respectfully urge the Court to grant the Petition for a Writ of Certiorari, and to consider carefully the issues presented by Petitioner's case.

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[1] 12 USC 2001, *et seq.*

ISSUES

1. The Second Circuit decision is contrary to the generally accepted interpretation of the Clean Water Act in the dairy.

As evidenced by the authorities cited in the Petitioner's brief, Congress did not intend the requirements of a "Concentrated Animal Feeding Operation" ("**CAFO**") to apply to dairy farms, nor did it intend for the application of manure on agricultural land to be treated as a "point source" under the CWA. Both of these findings are inconsistent with the express language of the CWA, and constitute an excessive burden upon American dairy farmers well beyond what is actually needed to preserve clean water.

In treating a large dairy farm as a CAFO, the Second Circuit Court decision applies the environmental requirements for an industrial site to a dairy farm. While this standard may be appropriate for heavily concentrated animal feedlot operations, it is completely inappropriate for a dairy farm. Today, successful dairy farms are managed as a holistic unit with beneficial recycling; land is used to grow crops, these crops are fed to the animals, and the animal manure is recycled into the land as a soil nutrient. Inputs and outputs are carefully coordinated in cycles which balance each other to maintain a clean ecosystem while improving soil fertility. Requiring a dairy farm unit to meet CAFO requirements is an excessive and needless regulatory burden which will discourage farmers from expanding their farming operations and impose unnecessary costs and unwarranted time delays without any corresponding benefit to the environment.

The Second Circuit decision, characterizing the discharge from manure spreading equipment as a "point source" discharge, potentially affects virtually every dairy

farm and other livestock operation in America. The manure application program used by Petitioner's farm is comparable, for purposes of this discussion, to the system used by most dairy farmers throughout the United States. Treating each application of manure on farmland as a point source discharge will require virtually every dairy farmer, whether a small or large dairy operation, to drastically change his manure management program. For many small and medium-sized dairy farmers, this could have a significant impact on their continued economic viability.

As lenders to the dairy industry, we believe the Second Circuit's decision is contrary to an informed reading of the CWA, and to the generally held understanding of this law among dairy farmers, agricultural lenders and various state authorities. Further, dairy farmers have made business decisions, and lenders have lent money to dairy farmers, with the understanding that the CWA does not apply to dairy farms in the ways found in the Second Circuit Court's decision. The Second Circuit's decision changes the environmental ground rules in midstream for dairy farmers and their lenders, and may have an *ex post facto* negative effect on many of these business and lending decisions. If the lower court's decision is allowed to stand, there is the potential for serious injury to the dairy industry and its lenders without an equivalent corresponding benefit to the environment.

To be justified, the radical changes and increased regulation of the American dairy industry suggested by the Second Circuit's decision must be supported by the clear legislative intent of Congress as found in the express statutory language of the CWA. If this Court grants Petitioner's Writ of Certiorari, thus examining the Second Circuit decision, we believe that this Court will find no

support in the CWA for the Second Circuit decision. In light of the potentially large negative impact of the lower court decision, it is vital to the continued viability of America's dairy industry and its lenders that this Court grant Petitioner's Writ of Certiorari and examine the issues.

2. If allowed to stand, the Second Circuit decision will have potentially serious adverse economic consequences for all dairy farms.

A. If large dairy farms must meet CAFO requirements, the following results may be expected for America's dairy industry:

- Large dairy farms will be burdened with over-regulation disproportionate to their potential impact on the environment and unsupportable by the present economics of the dairy industry. There is also a danger of double regulation by both federal and state regulators. This is contrary to the present de-regulatory climate in Washington, and needlessly complicates dairy farming.
- The cost of compliance with environmental requirements, both in time and money, will significantly increase for large dairy farms, making them less profitable and increasing the upward pressure on dairy prices to consumers. For some large dairy farmers, these increased costs may make it harder to obtain sufficient operating credit.
- Dairy farmers may be discouraged from increasing the size of their dairy operations to the 700 animal (CAFO-sized) level or above. This will make the economies of scale inherent in larger farms less available to dairy farmers, thus stagnating an important

industry, and will create an artificial economic barrier for farmers trying to expand.

B. If the discharges from manure spreading equipment are considered as a point source discharge, the following results may be expected for America's dairy industry:

- All dairy farms will be burdened with excessive restrictions on manure handling which are both disproportionate to their potential negative impact on the environment, and unsupportable by the present economics of the dairy industry. There is also a danger of double regulation by both federal and state regulators, since some states may already have existing standards in place governing this activity.
- Manure management practices will change drastically, becoming more inefficient and costly. It may be necessary to dispose of manure by other more expensive means if it cannot be applied to the land as a crop fertilizer. Farmers may be required to construct larger manure storage facilities in areas where the local soil type or weather permit less frequent application to the land. It may also be necessary to purchase other forms of soil nutrients or man-made fertilizer to offset the inability to use manure.
- For many dairy farmers, the increased costs of environmental compliance are not recoverable under present dairy industry economics. There is the real potential for family dairy farmers to be driven out of business in large numbers. In the alternative, to cover these costs it may be necessary to provide state or federal subsidies to maintain these dairy farm units, or to increase dairy product prices to the consumer. A further concern is that these increased production costs may seriously hamper the ability of

American dairy producers to compete with dairy products in the world market, as well as with foreign dairy products appearing in the U.S., due to recent changes in the General Agreement on Tariffs and Taxes ("GATT"). Any perceived potential corresponding benefit there may be to the environment from the Second Circuit decision does not warrant these serious, drastic human and economic consequences.

- In 1993, the Environmental Protection Agency published final rules[2] on the acceptable application of biosolids (sewage sludge) to agricultural and non-agricultural land pursuant to the CWA. The "message" sent by the Second Circuit Court's decision on manure may well reduce the agricultural community's acceptance of biosolids as a soil nutrient option if manure from their own farm is considered a point source. Since there is a ban on ocean dumping, which was the previous disposal method for this waste, the Second Circuit's decision may remove an important disposal alternative for biosolids material when few alternatives are available. This will put increased pressure on towns and municipalities trying to secure new outlets for biosolids disposal, and it may further drive up disposal costs to these communities.

3. The potential for economic harm to the dairy industry may also have potentially adverse consequences for agricultural lenders and rural communities.

- The increased costs of regulatory compliance may make many family dairy farms economically non-

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[2] 40 CFR Part 257 *et al.*

viable. If a sufficient number of these farmers are forced to leave farming, the sudden surplus of land for sale could significantly drive down the value of agricultural land to a level which makes the recapture of owner equity and the repayment of farm debts impossible.

- A dramatic reduction in the value of agricultural land also affects its value as collateral for new loans. Lower land values reduce the availability of new operating credit to all farmers, some of whom may lose access to the full amount of credit they need to stay in business because it is unsupported by the value of their land as collateral.
- Lenders will be hurt by a serious decline in land values. The credit quality of agricultural loan portfolios will deteriorate as increasing numbers of loans become delinquent due to borrowers' insufficient repayment ability. Without operating lines of credit, these dairy farmer borrowers will lose the ability to operate their farms effectively and to repay their loans. Eventually, these borrowers will default on their loan payments, and lenders will need to sell the loan collateral to pay off these loans. If the land collateral is undervalued, due to market conditions, its sale price will not be sufficient to pay off the loan it secures, and lenders will incur losses on these loans. Ultimately, lenders may be forced to raise interest rates to all their other borrowers to offset these loan losses and collection costs, and perhaps to meet increased regulatory capital requirements stemming from this adversity.
- The effect of many dairy farmers going out of business and increased lender interest rates will have an

overall negative affect on the local rural economy throughout America, which is already under negative pressures from other sources. A strong, locally-owned and operated dairy industry is critical for rural communities, such as Wyoming County, New York, to maintain their economic and environmental diversity. The presence of strong local agriculture in these rural communities assures the continued presence of needed open land and vistas, while its economic presence continues to support local supply, service and processing markets.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Table of Contents

Page

Interest of *Amicus Curiae* 1

Argument:

POINT I. The court erred in finding that Southview was a CAFO 5

POINT II. The discharge of manure from agricultural spreading and spraying equipment over a diffuse area of the farm is not a point source discharge 12

Conclusion 16

TABLE OF AUTHORITIES

CASES:

Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976) 12

Avoyelles Sportsmen's League, Inc. v. Alexander, 473 F. Supp 525 (W.D. La 1979) 15

Carr v. Alta Verde Industries, Inc., 931 F.2d 1055 (5th Cir. 1991) 11

Natural Resources Defense Council v. E.P.A., 915 F.2d 1314 (9th Cir. 1990) 12

Natural Resources Defense Council v. Train, 396 F. Supp. 1393 (D.D.C. 1975), aff'd sub. nom. Natural Resources Defense Council v. Costle, 568 F.2d 1369 (D.C. Cir.1977) 13

United States v. Plaza Health Labs, Inc., 3 F.3d 643 (2d Cir. 1993) 13

STATUTES AND REGULATIONS:

33 U.S.C. § 1251 ..... 2, 3

33 U.S.C. § 1288 ..... 8, 13

33 U.S.C. § 1342 ..... 5, 6, 13

33 U.S.C. § 1344 15

33 U.S.C. § 1362 ..... *passim*

40 C.F.R. § 122.23 ..... 4, 6

MISCELLANEOUS:

Draft Proposal for Legislation to Control Water Pollution From Agricultural Sources, 59 Cornell L. Rev. 1097 (1974) 8

H. Rep. 93-1012, Control of Pollution From Animal Feedlots and Reuse of Animal Waters, April 25, 1974 9

Klausner, "Animal Density Guidelines", What's Cropping Up, Vol. 4, No. 1 (1994) 10

Liquid Manure Application Systems, Design, Management and Environmental Assessment, Proceedings from Liquid Manure Application System Conference; Cooperative Extension Publication NRAES-79 (1979) 10

New York Agricultural Statistics Service and New York State Department of Agriculture and Markets, Division of Statistics, New York Agricultural Statistics, 1993-94, July 1994 2

S. Rep. No. 92-414, 92d Cong., 1st Sess., reprinted in 1972 USCCAN 3668 ..... 5, 8, 9, 12

S. Rep No. 95-370, 95th Cong. 1st Sess., reprinted in 1977 USCCAN 4326 14

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BRIEF FOR *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONERS

Interest of *Amicus Curiae*

The State of New York submits this brief in support of the Petition for a Writ Of Certiorari submitted by Southview Farm and Richard H. Popp. This case involves the overly-broad interpretation by the Court of Appeals for the Second Circuit

that (1) certain livestock operations that also grow crops as animal feed, and (2) certain agricultural activities such as the spreading and spraying of recycled animal wastes, are point sources of pollution subject to the permitting process under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*

Amicus submits that the interpretation by the Court of Appeals is unnecessarily broad which, if left unchallenged, will have a detrimental effect on all New York farmers who apply both organic and chemical fertilizers to their land. In particular, it will require dairy farmers who recycle animal wastes on farm cropland to apply for and comply with the conditions of a pollution discharge permit before being allowed to conduct the normal agricultural practice of applying manure to crop land. The failure to secure such a permit will not only subject New York farmers to burdensome compliance costs and regulatory sanctions, but also to protracted citizen suits under the CWA. The Court of Appeals' decision threatens the economic viability of a State industry which is already experiencing difficult times.

Agriculture is an important industry in New York, producing over $2.9 billion in cash receipts for 1992, the latest figures available. New York Agricultural Statistics Service and New York State Department of Agriculture and Markets, Division of Statistics, *New York Agricultural Statistics, 1993-94,* July 1994, Table 6 at 11. In 1993, there were 38,000 farms in this State, averaging 216 acres in size. *Id.*, Table 3, at 6. Livestock agriculture represents a substantial portion of New York's farm economy. In 1992, cash receipts from the sale of animals and the products they produce represented 65% of total farm cash receipts, with dairy products accounting for 51.9% of that number. *Id.,* Table 6 at 11. Cash receipts from the sale of milk during 1993 totaled $1.46 billion. *Id.*, at 47. New York ranks

third nationally in the production of milk. *Id.*, Table 7 at 12. Unlike large animal feedlots found in other parts of the United States, dairy farms and other livestock farm operations found in New York typically grow crops on the farm to feed the cattle housed there. The animal wastes generated by the animals are then collected and applied to the farm's fields for use as a crop fertilizer. The spreading of manure on the farm cropland is the ultimate recycling activity, serving not only as a source of the primary nutrients of nitrogen, phosphorus and potassium, but also providing organic matter and a variety of essential micro nutrients.

When Congress enacted the 1972 amendments to the Federal Water Pollution Control Act (FWPCA), 86 Stat. 816, codified as amended, 33 U.S.C. § 1251 *et seq.*, [later renamed the Clean Water Act ("CWA")], it intended to regulate the discharge of effluents from large animal feedlots or "concentrated animal feeding operations" (CAFO's). CAFO's, which are located throughout the United States, have insufficient acreage to grow crops and dispose of animal wastes. Consequently, vast amounts of manure accumulate but are not recycled on the farm's cropland. It appears clear that at the time of the enactment of the law, Congress did not intend to regulate dairy farms such as Southview, which recycle the manure back into the farm's cropland. *See*, 33 U.S.C. §1362(14) and 1972 U.S. Code Cong. & Admin. News ("USCCAN") 3668, 3761, Pub. L. No. 92-500 (supplemental views of Senator Robert Dole). Congress chose instead to regulate CAFO's, or large feedlots that do not grow crops on the farm.

The Court of Appeals has incorrectly determined that Southview Farm is a CAFO by misconstruing the "crop-

growing exception".[1] This requires crops to be grown in the exact location where the animals are confined, which in colder climates such as those in New York, would effectively necessitate that the crops be grown in the barn. The Court of Appeals has effectively negated the exception that was meant to exclude large livestock operations which grow crops for feed and have sufficient land to accept the recycled animal waste without causing environmental damage.

Of even greater consequence to New York agriculture is the court's alternate finding that small and mid-size farms (i.e., those farms with fewer than 700 mature dairy cows or 1,000 slaughter and feeder cattle) may be subject to the permit requirements under the Clean Water Act when engaged in the normal agricultural practices of spraying and spreading animal wastes on crop fields. The court specifically found that certain types of agricultural equipment, such as sprayers and trucks used for spreading manure, are point sources subject to regulation under the CWA. If this decision is not overturned, farms of all sizes could be subject to the CWA permit process simply because of the diffuse spraying or spreading of manure that eventually finds its way to streams through runoff. Such an interpretation is contrary to the intent of Congress, which provided that the regulation and enforcement of diffuse nonpoint source discharges of pollution such as animal wastes be left to the States.

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[1]As explained later, a large livestock operation is not defined as a CAFO if crops or forage are not grown "over any portion of the lot or facility". 40 C.F.R. § 122.23(b)(ii).

The State of New York is concerned that the Court of Appeals ruling, if not reversed, will have a detrimental impact on agriculture.

ARGUMENT

POINT I

The court erred in finding that Southview Farm was a CAFO

The Court of Appeals erred in finding that Southview Farm, and other similar farms which have sufficient cropland, are CAFO's and therefore point sources under the CWA. When the Federal Water Pollution Control Act was enacted in 1948 Congress intended that the States, and not the Federal Government, "lead the national effort to prevent, control and abate water pollution." *See,* Sen. Rep. No. 92-414, 1st Sess., reprinted in 1972 USCCAN 3668, 3669, for a discussion of earlier efforts to control water pollution.

In 1972, amendments to the Federal Water Pollution Control Act were enacted to clean up the nation's navigable waters by 1985. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3674. The law created the National Pollution Discharge Elimination System (NPDES), which made it illegal to discharge a pollutant from a point source without first obtaining a permit (NPDES permit). 33 U.S.C. § 1342(a)(1). The law also provides that States may issue such permits (SPDES permits) pursuant to a state pollutant discharge elimination system upon the condition that all such discharges meet the requirements of the FWPCA. 33 U.S.C. § 1342(b).

New York State is authorized to issue SPDES permits under the FWPCA. 33 U.S.C. § 1342(b)

The definition of "point source" includes CAFO's. 33 U.S.C. § 1362(14). EPA regulations define a CAFO as: an "animal feeding operation" which meets the criteria in Appendix B of this part; or which the Director designates under paragraph (c) of this section. 40 C.F.R. § 122.23(b)(3). An "animal feeding operation" is defined as a lot or facility (other than an aquatic animal producing facility) where the following conditions are met:

> (i) animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) crops, vegetation forage growth, or post harvest residues are not sustained in the normal growing season *over any portion of the lot or facility*.

40 C.F.R. § 122.23(b).

Appendix B sets forth the criteria for determining the minimum number of animals required for a concentrated animal feeding operation to include, *inter alia*, more than (1) 1,000 slaughter and feeder cattle, and (2) 700 mature dairy cattle (whether milked or dry).

In order to determine whether a livestock operation is an animal feeding operation, one must determine whether crops or other vegetative growth are being sustained over any portion of

the "lot or facility". The Court of Appeals mistakenly interpreted the terms "lot or facility" to include only the restricted area where the animals are housed and fed and not other parts of the farm (or facility) where crops are grown. As a result, the court effectively eliminated the "crop growing exception" which reflects Congress' intent to regulate only large feedlots without the capacity to recycle the manure, unlike those found in New York.

Such an interpretation makes no practical sense. As a result of extreme climactic conditions, cattle raised in New York must be housed and fed in barns and not in open feedlots typically found in other parts of the country. It is impossible to grow crops in a barn. Equally impractical is the requirement under this decision that cattle "pasture" or graze in the fields where the crops are being grown. Corn stalks (corn is a typical animal feed on New York farms) averaging eight to ten feet when full grown, would ultimately be trampled by pasturing animals. It would also be impossible to separate the animal wastes from the crops, thereby preventing their use as animal feed. When cows do "pasture", they do so not on crop land, but in fields that are not currently growing crops. In interpreting the "crop growing exception", the courts must adopt a reasonable construction and the Court of Appeals has failed to do that.

In its decision the Court of Appeals interpreted "facility" in such a way that it negates the "crop growing exception". A "facility" cannot reasonably mean less than the entire farm. The court's interpretation is not consistent with the Congressional intent to lessen barnyard runoff of animal wastes only from

feedlots that have insufficient cropland properly to absorb the manure.[2] In enacting the 1972 amendments, Congress clearly recognized that the development of large and intensive livestock feedlots, and the resulting increase of animal wastes requiring proper disposal, were producing massive concentrations of manure in small areas. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3761, (supplemental views of Senator Robert Dole). Congress specifically intended to include these large feedlots, or CAFO's, as point sources of pollution subject to the NPDES effluent limitations.

It is also clear that Congress generally regarded the runoff of agricultural byproducts, including animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals to be nonpoint source pollution. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3705 and 33 U.S.C. § 1288(b)(2)(F). Instead of regulating such discharges, EPA was instructed to provide funding to the Department of Agriculture to conduct research and provide technical and financial assistance to promote sound land use and pollution control that would lead to "the installation of systems for management, storing and recycling of animal and poultry wastes and other agricultural related pollutants." S. Rep. No. 92-414, 92d Cong.,

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[2]It is primarily the effects of nitrogen and phosphorous that contribute to water pollution. Concentrations of nitrogen in excess of 10 milligrams per liter in drinking water are considered dangerous, while excessive amounts of nitrogen and phosphorous result in eutrophication (the accelerated growth algae). *See, Draft Proposal For Legislation to Control Water Pollution From Agricultural Sources*, 59 Cornell L. Rev. 1097, 1101 (1974).

1st Sess., *reprinted in* 1972 USCCAN 3668, 3718. Implementation of these land use practices was to be accomplished under the State Section 208 programs.

In discussing the issue of animal wastes, the House Committee on Governmental Operations, in 1974, recognized the nutrient value of animal wastes, by calling for a greater emphasis on recycling and reusing. Congressman Henry S. Reuss summed up the problem by noting:

> It is certainly ironic that as we face a terrible shortage of chemical fertilizers, and as more and more precious natural gas feedstocks are devoted to the production of those fertilizers, we continue to waste the priceless animal resources which have strengthened the soil and increased production for thousands of years, by allowing them to percolate or flow into our streams and cause problems there. The whole thing would cause a stranger to laugh at this planet.

H. Rept. 93-1012, *Control of Pollution From Animal Feedlots and Reuse of Animal Wastes*, April 25, 1974, at 47.

Prior to the recognition of the environmental concerns associated with agriculture, farmers in the Northeast were concerned with determining and utilizing proper levels of nutrients (nitrogen, phosphorus, etc.) to maximize crop yields. Now, with new recognition of their role as stewards of the land entrusted to them, they are also concerned about the levels at which certain of these nutrients are entering the Nation's waters.

Farmers recognize that maximizing profits and protecting the environment are not mutually exclusive concepts. With a properly designed nutrient management plan, a farmer can reduce fertilizer costs while also environmentally controlling the "disposal of animal waste". In implementing such a plan, the crop soil is first tested to determine the amount of nutrients needed to grow the animal feed. Specific manure application rates are then established and application methods are selected to avoid the runoff of the nutrients. After consuming the crops, the animals will then produce more wastes that again will be recycled as nutrients for the growing crops. For a further discussion of this process and farm nutrient issues in general, *see, Liquid Manure Application Systems, Design, Management, and Environmental Assessment,* Proceedings from Liquid Manure Application Systems Conference; Cooperative Extension Publication NRAES-79 (1979).

Essential to the success of any farm nutrient management plan is the requirement that there be sufficient land not only to grow sufficient crops to feed the animals but also to absorb the manure. A successful nutrient management plan is dependent upon the amount of cropland available relative to the size of the herd. As the size of the herd increases, a corresponding increase in cropland must also occur. According to Dr. Stuart Klausner of Cornell University's School of Agriculture and Life Sciences, an animal unit (the equivalent of a 1,000 pound animal) to acreage density ratio of between 1 and 1.5 (with a typical animal feed ration of corn and alfalfa) will provide an adequate land base for spreading the manure while also supplying sufficient nitrogen to approximate crop requirements. *See*, Klausner, "Animal Density Guidelines", *What's Cropping Up,* Vol. 4, No. 1 (1994) for a more detailed explanation.

The record indicates that Southview had an animal unit to acreage density ratio of 1.35 (Trial Testimony, pp. 1947-1949), well within the favorable limits recommended by Dr. Klausner. In these cases, if the manure is properly handled, there should be little runoff since there is sufficient cropland to absorb the manure.

In including CAFO's as point sources, it was the intent of Congress to regulate large livestock operations that had insufficient cropland to utilize the nutrients contained in the manure and to exclude from regulation farms such as Southview that have sufficient cropland to recycle their manure properly. *See*, *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991), in which the feedlot consisted of 20,000 to 30,000 head of cattle with only 230.9 acres. Feedlots with such a high animal to acreage ratio can create an environmental "nightmare" unless closely regulated. This is the type of operation that Congress clearly intended to regulate under the NPDES permit process. It did not intend to regulate farms such as Southview which have sufficient cropland to recycle the manure properly.

It is clear that in improperly classifying as CAFO's large New York farms that also grow crops for animal feed, the Court of Appeals has disregarded the intent of Congress.

POINT II

The discharge of manure from agricultural spreading and spraying equipment over a diffuse area of the farm is not a point source discharge

In addition to finding that Southview Farm was a CAFO and therefore a point source, the Court of Appeals incorrectly ruled that the agricultural equipment used to spray and spread manure were point sources.

The CWA distinguishes between point and nonpoint sources of water pollution. Point source pollution results from a clearly discernable discharge point, such as a pipe, ditch, or CAFO. 33 U.S.C. § 1362(14). Nonpoint source pollution, however, comes from a diffused point of discharge, such as fertilizer runoff from an open field. While recognizing that controlling nonpoint source pollution would be required if water quality goals were to be attained, Congress clearly intended, because of the large number and types of nonpoint sources of pollution, the site specific nature of the pollution and the lack of technology to control the problem, that the runoff of agricultural byproducts be exempt from the permitting process established under the Clean Water Act and instead be addressed through the Section 208 program. S. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 1972 USCCAN 3668, 3705.

Nonpoint source pollution has been defined by the courts as the "unchanneled and uncollected surface water" (*Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)), "a runoff of pesticides from farmlands" (*Natural Resources Defense Council v. E.P.A.*, 915 F.2d 1314, 1316 (9th Cir. 1990)), and the "runoff...[of] agricultural chemicals from

farmlands, . . . and other substances washed by rain, in diffuse patterns, over the land and into navigable waters" (*United States v. Plaza Health Labs, Inc.*, 3 F.3d 643, 652 (2d Cir. 1993) (Oakes, J. dissenting)). With the exception of CAFO's, most agriculture pollution is nonpoint because it is being discharged over a diffused area.

When the courts have at times attempted to regulate certain nonpoint agricultural discharges under the permit provisions of the CWA, Congress has acted quickly to clarify its intent. For example, when shortly after the enactment of the 1972 amendments EPA attempted to exempt from the NPDES permit process smaller industrial, commercial and agricultural operations which had flows discharged through pipes, the Court of Appeals for the District of Columbia Circuit ruled that EPA had exceeded its authority. *See, Natural Resources Defense Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom. Natural Resources Defense Council v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977). EPA then amended its regulation to cover operations of all sizes. Congress, in sending a clear message regarding the special treatment agricultural activities were to receive, promptly amended not one, but three separate sections of the CWA to (1) exclude from the definition of point source "return flows from irrigated agriculture" (33 U.S.C. § 1362(14)), (2) specifically prohibit the EPA from requiring, directly or indirectly, a NPDES permit for return flows from irrigation (33 U.S.C. § 1342(l)) and (3) specify that irrigation return flows would be covered under the Section 208 nonpoint source program (33 U.S.C. § 1288(b)(2)(F)).

In correcting the interpretations of the courts in the *Train* case, Congress made clear that not only did it intend to exempt

discharges from "return flows" from agricultural, but also other forms of agricultural runoff.

> Testimony in field hearings suggested that effluent limits based on technological methods may not be appropriate for control of return flow pollutants and the committee determined that these sources were practically indistinguishable from any other agricultural runoff, which may or may not involve a similar discrete point of entry into a watercourse. All such sources, regardless of the manner in which the flow was applied to the agricultural land, and regardless of the discrete nature of the entry point, are more appropriately treated under the requirements of Section 208(b)(2)(F).

S. Rep. No. 95-370, 95th Cong., 1st Sess., *reprinted in* 1977 USCCAN 4326, 4360.

It is obvious that Congress was less concerned with the method of application and more concerned with the ultimate effect of the discharge and the best method to contain it.

Similarly, when in 1987 Congress was acting to require NPDES permits for industrial and commercial stormwater discharges, it made it clear that stormwater runoff from agricultural sources would not be included in the definition of point source. Specifically, Congress, in the Water Quality Act of 1987, amended the term "point source" to read, as it does today: "this term does not include agricultural stormwater discharges and return flows from irrigated agriculture." Pub. L. No. 100-4, Section 503, 101 Stat., 5, codified at 33 U.S.C. 1362(14). In

doing so, it seems clear that Congress wished to exempt most agricultural activities.

Throughout the history of the CWA, Congress has recognized that certain normal agricultural practices, including the spreading of manure, contribute to the pollution of the Nation's waters.[3] It has, however, except in very limited circumstances, left the regulation of the discharge of agricultural pollutants to the State as a nonpoint source under the Section 208 program and the more recently enacted Section 319 program. 33 U.S.C. §§ 1329, 1388.

The manure spreading wagon and the spigot used to spray the liquid on various fields do not meet the definition of point source under the CWA when they are employed in their normal manner to spread or diffuse manure on agricultural land. The terms "spread" and "diffused" have a meaning in total opposition to the words "discerned, confined and discrete" that are used in the CWA to describe a point source. Congress' intent to exempt most agricultural activities from NPDES permits, coupled with the literal meaning of the words spreading and spraying, leads to the common sense conclusion that the spreading and spraying of manure are normal agricultural practices of the type meant to be

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[3]The CWA does contain authority for considering the usage of certain equipment in determining whether it is a point source. CWA § 404 (33 U.S.C. § 1344) classifies certain equipment used in dredging and filling activities to be a point sources, unless the equipment is used in "normal farming activities," including plowing, seeding and cultivating. *See, Avoyelles Sportsmen's League, Inc. v. Alexander,* 473 F. Supp. 525 (W.D. La 1979).

exempt from enforcement under the CWA. The Court of Appeals ruling to the contrary is incorrect.

CONCLUSION

The Court should grant the petition for certiorari.

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Respectfully submitted,

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